United States Court of Appeals

for the Second Circuit

REPLY BRIEF

ORIGINAL

75-4105

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 75-4105
75-4113
75-4118

- x

ITT WORLD COMMUNICATIONS INC., :
RCA GLOBAL COMMUNICATIONS, INC., :
and WESTERN UNION INTERNATIONAL, INC., :

Petitioners, :

-against- :

FEDERAL COMMUNICATIONS COMMISSION :
and UNITED STATES OF AMERICA, :

Respondents, :

and :

TRT TELECOMMUNICATIONS CORPORATION, :

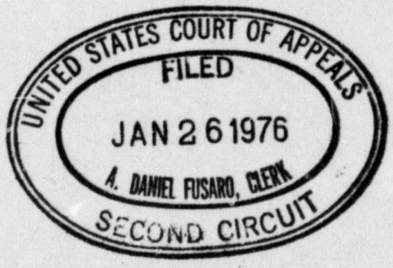
Intervenor. :

- x

B/P/S

Petition for Review of a Memorandum
Opinion and Order of the
Federal Communications Commission

REPLY BRIEF OF PETITIONER
RCA GLOBAL COMMUNICATIONS, INC.



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REPLY BRIEF OF PETITIONER
RCA GLOBAL COMMUNICATIONS, INC.

RCA GLOBAL COMMUNICATIONS, INC. ("RCA Globcom"), the petitioner in Docket No. 75-4113 and an intervenor in support of the Petitions in Docket Nos. 75-4105 and 75-4118, submits this reply brief in short response to the answering papers of the Government respondents and of intervenor TRT TELECOMMUNICATIONS CORPORATION ("TRT").

ITT WORLD COMMUNICATIONS, INC. ("ITT Worldcom"), the petitioner in Docket No. 75-4105 and an intervenor in support of the Petitions in the two other Dockets now before the Court, deals in its reply brief with the fundamental position of the Government respondents and of TRT. This is the contention that TRT's challenged tariff, because it has been dubbed an "experiment",* does not discriminate too much to pass muster under Communications Act § 202(a), 48 Stat. 1070 (1934), 47 U.S.C. § 202(a)(1970).

In accord with the policy of Fed.R.App.Proc. 28(i) and RCA Globcom's prior practice in these proceedings, it adopts, for purposes of this case, ITT Worldcom's arguments in this respect. We comment briefly, in the paragraphs following, on two other points raised in the answering papers. These are:

(a) The suggestion of the Government respondents and of TRT that RCA Globcom may not, in support of the petitioners' argument that TRT's tariff is unlawfully discriminatory, invite this Court's attention to the

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* At this writing the "experiment" is scheduled to expire at the end of January, although TRT has expressed to the Commission its desire to continue it thereafter with respect to telex traffic to West Germany.

policies of The Uniform Time Act of 1966, 80 Stat. 107, 15 U.S.C. §§ 260-66 (1970), and of the international Telegraph Regulations of Geneva, 10 U.S.T. 2423 (1960); and

(b) TRT's contention (TRT pp. 22-26), not endorsed by the Govenrment respondents, that a defect in the proceedings below, precludes an Order by this Court directing rejection of TRT's unlawful tariff.

POINT I

THIS COURT MAY PROPERLY CONSIDER THE UNIFORM TIME ACT AND TELEGRAPH REGULATIONS IN ASSESSING THE TARIFF'S DISCRIMINATORY CHARACTER

TRT's challenged tariff sets a nation-wide "off hours" rate which wholly disregards the country's four continental time zones and treats, for purposes of "off hours" billing, the whole United States as if it were the Borough of Manhattan. In the proceedings before the Commission, RCA Globcom, like the other petitioners, vigorously pressed the argument that this feature of TRT's tariff was rendered unlawful by Communications Act § 202(a)'s ban on undue discrimination between "particular person[s], class[es] of persons, or localit[ies] * * *." (See A-91-92, 98-101, 39-40, 79-80.)

In the main briefing to this Court, ITT Worldcom developed this position in an argument in which RCA Globcom concurred pursuant to Fed.R.App.Proc. 28(i). (RCA Globcom Br. pp. 2, 8) As a further "contribution to the argument", intended to show "the importance which the law conventionally attaches to time zones" (id. at pp. 8,9), we invited the Court's attention to the Uniform Time Act, to cases construing it, and to the Telegraph Regulations (id. at pp. 9 - 13). These citations reflect, of course, the familiar doctrine that:

> "[a] regulatory agency may, should, and in some instances, must give consideration to objectives expressed by Congress in other legislation, assuming they can be related to the objectives of the statute administered by the agency." City of Chicago v. FPC, 385 F.2d 629, 655 (D.C. Cir.), cert. denied sub nom. Public Service Comm'n v. FPC, 390 U.S. 945 (1967) (citations omitted)

See also Associated Press v. FCC, 452 F.2d 1290, 1298 (D.C. Cir. 1971).

RCA Globcom's filings below did not mention the Uniform Time Act and the Telegraph Regulations. The proponents of TRT's tariff now insist RCA Globcom cannot mention them here since it is trying to raise a new "issue". (Gov't Br. P. 12 fn. 11; TRT Br. p. 27 fn. 20) This contention strikes us as disingenuous nonsense. The "new" materials, which

respondents and TRT appear singularly unable to meet on the merits, do not raise a new issue; rather they buttress a position which has been in this proceeding from the beginning.* They are no more objectionable than the many case authorities, uncited below (see A-109-32), which TRT now advances in support of the tariff's ostensible propriety.

In any case, the Commission makes clear in its brief to this Court that Uniform Time Act and Telegraph Regulations, if mentioned below, would have made no difference there. Its submission states:

> "In any event, the argument tends only to show that local time normally would govern tariff offerings, a fact conceded by the Commission. It bears not at all on the real question -- the reasonableness of the discrimination in this experimental context. (Gov't Br. p. 12 fn. 11.)

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* The distinction is illustrated by the Government's featured authority on this point, Gross v. FCC, 480 F.2d 1288 (2d Cir. 1973). The petitioner in that case participated in a Commission rule-making aimed at restricting the use of amateur radio facilities, and he attacked the proposed regulation as an ultra vires exercise by the Commission of "censorship" (id. at 1290) in violation of Communications Act § 326, 48 Stat. 1091 (1934), as amended, 47 U.S.C. § 326 (1970). See FCC Report and Order, 37 Fed.Reg. 21997, at 21998 (1972). When the regulations issued petitioner sought review in this Court. Although the Court refused to consider arguments of petitioner which were unrelated to "censorship" (id. at 1290 fn. 5), the Court considered, without question, petitioner's invocation of the Constitutuion's First Amendment in behalf of his judicial challenge to the alleged "censorship" (id. at 1291).

When a similar situation arose in New York State Broadcasting Ass'n v. United States, 414 F.2d 990 (2d Cir. 1969), this Court rejected a Government claim that the petitioners could not raise initially in this Court a constitutional challenge to a Commission ruling. The Court then said:

> "Here, on the other hand, the Government apparently agrees that the Commission either would not or could not declare that 18 U.S.C. § 1304 is unconstitutional, as petitioners contend. The Government does not suggest that it would have made any difference at all in the ruling of the Commission had the constitutional arguments been pressed by these petitioners." (414 F.2d at 994) (emphasis supplied)

See also Massachusetts Trustees v. United States, 377 U.S. 235, 246-248 (1964).

POINT II

THIS COURT HAS THE POWER TO DIRECT THE FCC TO REJECT THE TARIFF IN QUESTION

TRT's argument that the Commission could not, and hence this Court cannot, reject its tariff without further lengthy proceedings at the agency level is refuted by the principal authority which TRT offers in behalf of this bizarre proposition. In Associated Press v. FCC, 448 F.2d 1095 (D.C. Cir. 1971), the Court said:

> ". . . an agency has the power and in some cases the duty to reject a tariff that is demonstrably unlawful on its face. Thus, an agency will reject a tariff that conflicts with a statute, agency regulation or order, or with a rate fixed in a contract sanctioned by statute; similarly, a tariff will be rejected if it is unlawful without prior agency approval, and approval has not been obtained. In such cases the refusal of an agency to reject a tariff may be reviewed by the courts." (448 F.2d at 1103) (emphasis supplied)

TRT's argument to the contrary is a corollary of its fundamental (and erroneous) contention that there is something exquisitely subtle about the challenged defect in its tariff. We do not here challenge, as did the petitioners in the above case, a carrier's rate levels (i.e., $2.00/minute as against some other ostensibly "fairer" rate). Nor do we here confront "the problem of differing rates between customers in different classes", Associated Press v. FCC, 452 F.2d 1290, 1301 fn. 86 (D.C. Cir. 1971). Rather the issue here is "carrier discrimination within a single class".* (Ibid) The tariff here in issue is one which, in practice, offers an afternoon discount to any and all customers in Los Angeles and other western centers, but

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* Communications Act § 201(b), 48 Stat. 1070 (1934), as amended, 47 U.S.C. § 201(b) (1970), specifically authorizes differing rates for different service classes (e.g., press messages, "night letters", etc.) provided the differentials between classes are "just and reasonable". This proviso, though central to many tariff controversies, including the one in Associated Press, see 452 F.2d at 1299, is beside the point here.

none to any customer in New York City and other Atlantic Coast locales.

This, we submit, is flatly unlawful. American Trucking Ass'n v. FCC, 377 F.2d 121, 130 (D.C. Cir. 1966), cert. denied, 386 U.S. 943 (1967), is a leading authority on "single class" discrimination, and the Court there said:

> "The prohibition against different charges to different customers for like services under like circumstances is flat and unqualified. The pertinent section of the statute bristles with 'any'. It is made unlawful for 'any' carrier to make 'any' undue preference to 'any' particular person, or to subject 'any' person to 'any' undue prejudice. Moreover it is quite clear that this is not a matter of statutory semantics. It is a matter of public interest and policy. The money difference in price is the core of the prescription. Equal prices for like services is in itself a matter of public interest."

The point, in last analysis, is simple and straight forward. Can TRT ignore time zones when applying, across the country, a tariff which depends for its applicability upon the time of traffic's transmission? We say TRT cannot. TRT and the Commission insist that TRT can. That issue was joined before the Commission, was passed upon by the Commission, and is ripe for final decision here.

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Respondents,

TRT TELECOMMUNICATIONS CORPORATION,

Intervenor.

AFFIDAVIT OF SERVICE

- x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

ROBERT R. CAWTHRA, being duly sworn, deposes and says:

1. I am over the age of 18 years and not a party to this action.

2. On the 26th day of January, 1976, I served 2 copies of the annexed **Brief of Petitioner** upon:

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CONCLUSION

The Court should set aside the FCC's Order released June 6, 1975.

Respectfully submitted,

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by depositing true and correct copies thereof at the Post Office maintaned by the United States Postal Service at 73 Pine Street, New York, New York, by first class mail, postage prepaid.

Robert R Cawthra

Sworn to before me this
26th day of January, 1976

Notary Public

JOHN NICOL
Notary Public, State of New York
No. 60 2889500
Qualified in Westchester County
Certificate filed in New York County
Commission Expires March 30, 1977